

MAR 27 1973

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1176

North Dakota State Board of Pharmacy,
Petitioner,

vs.

Snyder's Drug Stores, Inc.,
Respondent.ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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March 20, 1973

INDEX

OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	10

TABLE OF CASES

Bob Rosen Water Conditioning Co. v. City of Bismarck, 181 N.W.2d 722 (N.D. 1970)	6
Brooks v. State Board of Funeral Directors and Embalmers, 195 A.2d 728 (Md. App. 1963)	9
Fairmont Foods Co. v. Burgum 81 N.W.2d 639 (N.D. 1957)	6
Liggett Co. v. Baldrige, 278 U.S. 105 (1928)	5, 6, 7, 8, 10
Magan Medical Clinic v. California State Board of Medical Examiners, 57 Cal. Rptr. 256 (Cal. App. 1967)	8
Snyder's Drug Stores, Inc., v. North Dakota State Board of Pharmacy, 202 N.W.2d 140 (N.D. 1972)	4
Superx Drugs Corp. v. Michigan Board of Pharmacy, 146 N.W.2d 1 (Mich. 1966)	9

STATUTE

North Dakota Century Code 43-15-35(5)	2, 3, 4
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RULES

North Dakota Rules of Civil Procedure Rule 56(e)	7
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OPINION BELOW

As indicated by the petitioner, the opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTION PRESENTED

Properly stated, the question presented in the petition is whether the North Dakota Supreme Court correctly held that, on the record before it, Section 43-15-35(5) of the North Dakota Century Code violates the Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution because the statutory requirement limiting ownership of pharmacies to pharmacists or to corporations controlled by pharmacists does not bear a real and substantial relationship to the public health, safety and welfare.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 43-15-35(5) of the North Dakota Century Code is set out in the petition.

The applicable federal constitutional provision appears in Section 1 of the Fourteenth Amendment:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

Although substantially correct, the petitioner's statement of the case is not sufficiently complete to present properly the procedural background for the decision by the North Dakota Supreme Court.

In January of 1971 the respondent, Snyder's Drug Stores, Inc., had applied to the North Dakota State Board of Pharmacy for a permit to operate a pharmacy at the Red Owl Family Center in Bismarck, North Dakota. The application indicated that if the permit was granted, the pharmacy would be "conducted in full compliance with... existing laws and regulations of the Board of Pharmacy," and would in other respects meet all of the requirements of Section 43-15-35 for the issuance of a permit with the exception of the ownership requirement in Subsection (5).

The permit was subsequently denied by the State Board on March 22, 1971, both because Snyder's failed to meet the ownership requirements of Section 43-15-35(5) and because the proposed pharmacy would, allegedly, fail to meet certain structural and safety standards imposed by the State Board.

On April 12, 1971, Snyder's filed its notice of appeal from the denial. The company alleged that Section 43-15-35(5) was unconstitutional and that there was no evidence to support the State Board's findings with respect to the adequacy of the proposed structural and safety provisions.

Six months later, on November 16, 1971, Snyder's Drug Stores brought a motion for summary judgment, with accompanying affidavits, and scheduled a hearing for December 3, 1971. Since no countering affidavits were ever submitted by the State Board, the record before the trial court consisted of Snyder's application, its supporting affidavits and the federal and state rules and regulations governing the distribution and sale of drugs in North Dakota. Following the hearing on the summary judgment motion, the District Court held in favor of Snyder's Drug Stores on both the constitutional issue and the issues concerning the adequacy and legality of the Board's findings in the other areas.

On April 4, 1972, the State Board filed its notice of appeal from the judgment granting Snyder's motion for summary judgment. In its decision on the appeal, the North Dakota Supreme Court upheld the District Court's holding with respect to the unconstitutionality of Section 43-15-35(5), but remanded the case to the State Board for an additional administrative hearing with respect to the adequacy of the layout and safety provisions in the proposed pharmacy. *Snyder's Drug Stores, Inc., v. North Dakota State Board of Pharmacy*, 202 N.W. 2d 140, 145 (N.D. 1972).

ARGUMENT

In its petition the State Board of Pharmacy does not argue that the North Dakota Supreme Court failed to follow applicable Supreme Court decisions. Rather the State Board asks this Court to overrule its decision in *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), which the North Dakota court had followed, and to hold that a state can limit the ownership of profit-making pharmacies to a privileged few individuals without even presenting some evidence tending to show that the restrictive legislation bears a real and substantial relationship to public health, safety or welfare. This position does not find support in the Constitution, the decisions of this Court or in the decisions of lower federal and state courts.

In *Liggett Co. v. Baldridge*, *supra*, a Pennsylvania statute requiring pharmacies to be owned by pharmacists or by corporations owned by pharmacists was found to be an unconstitutional imposition on rights guaranteed by the Fourteenth Amendment. Two aspects of the decision stand out and are still good law today.

The first is the Court's formulation of the applicable standard of judicial review. In attempting to sustain the statute, the State of Pennsylvania had argued that the legislation was a valid exercise of the state's police power. To sustain such a contention, the statute had to bear "a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." 278 U.S. at 111-12. None of the Supreme Court decisions since 1928 have radically altered this formulation of the standard for reviewing legislation sought to be upheld under the state's police power, and the petitioner cites no such cases. The State Board admits as much since it does not assert that the

legislation is acceptable under a different Due Process standard, but rather argues on page 13 of its petition that the statute meets the *Liggett Company* test in that it "bears a real and substantial relation to the public health, safety, morals and general welfare." Moreover, such language is in accord with North Dakota decisions outlining due process requirements. See *Bob Rosen Water Conditioning Co. v. City of Bismarck*, 181 N.W. 2d 722, 724-25 (N.D. 1970), and *Fairmont Foods Co. v. Burgum*, 81 N.W. 2d 639, 646 (N.D. 1957). There is, then, no real argument about what the applicable standard of review is or should be.

The second aspect of the *Liggett Company* decision involves the state's obligation to produce at least some evidence to show the alleged rational connection between the legislation and a permissible public purpose when a suspect statute is challenged. In *Liggett Co. v. Baldrige*, this Court twice emphasized that the state had produced no evidence to support its position. Thus, this statement appears on page 113 of the opinion:

"In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion." [emphasis added]

278 U.S. at 113. Later in the same paragraph the Court stated:

"If detriment to the public health thereby [through the operation of chain drug stores] has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

In other words, the minimal and sensible holding of *Liggett Co. v. Baldridge* is that when the constitutionality of a state statute is challenged and the challenger shows that the legislation apparently adds nothing to the protection of the public health, safety and welfare, but rather simply secures monopoly power to a privileged, limited number of individuals, the state at least has the obligation to come forward with some evidence showing or suggesting a rational basis for the legislation. If it fails to do so, the legislation cannot be upheld.

In this case, the petitioner failed to produce any evidence supporting its contention that a statute restricting the ownership of pharmacies to pharmacists or corporations controlled by pharmacists has some relation to the public health, safety and welfare. No affidavits or other documents were submitted to the District Court at or prior to the summary judgment hearing to establish a reasonable relationship between the legislation and the public health or even to indicate that such evidence might be forthcoming at trial. Such affidavits are required under Rule 56(e) of the North Dakota Rules of Civil Procedure, which prohibits an adverse party from resting "upon the mere allegations or denials of his pleading," and requires him to "set forth specific facts showing that there is a genuine issue for trial."

Snyder's Drug Stores, on the other hand, had shown through its affidavits and citations that a multitude of federal and state statutes and regulations already adequately controlled the manufacture, distribution, handling and sale of drugs, that its proposed pharmacy would be conducted in accordance with all valid rules and regulations of the State Board of Pharmacy, other than

the ownership requirement, and that the pharmacy would at all times be under the supervision and management of a registered pharmacist in good standing in North Dakota, who in turn would be supervised by another pharmacist. Such evidence established at least a prima facie case that the legislation had no real, substantial relationship to the public health, safety or welfare, and consequently, under the *Liggett Company* decision, the State Board had an obligation to produce some evidence in support of its position. Since the Board failed to produce any such evidence, it should not now be heard to complain about the decision rendered against it.

It is clear from the North Dakota Supreme Court's decision that its holding rested in part on the State Board's failure to produce any kind of evidence countering the respondent's proof that the ownership legislation added nothing to the valid regulation of the drug industry for the protection of the public health:

"Having no assurance from the Board of Pharmacy that specific evidence lacking in *Baldrige* and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Pharmacy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late."

202 N.W.2d at 144.

As indicated, the petitioner cites no Supreme Court cases holding that *Liggett Co. v. Baldrige* is no longer applicable to legislation imposing restrictions on the ownership of pharmacies. The three state court decisions found by the petitioner also fail to support its position.

For example, *Magan Medical Clinic v. California State Board of Medical Examiners*, 57 Cal. Rptr. 256 (Cal. App. 1967), and

Brooks v. State Board of Funeral Directors and Embalmers, 195 A. 2d 728 (Md. App. 1963), involved legislation and factual situations different from that in the present case. In **Magan Medical Clinic**, *supra*, the contested California statute prohibited only doctors from owning pharmacies, obviously a much more limited prohibition than the North Dakota Statute; and the California law did permit doctors to own stock in corporations which operate pharmacies. 57 Cal. Rptr. at 265. In **Brooks v. State Board of Funeral Directors and Embalmers**, *supra*, the Maryland statute prohibited any corporation from operating an undertaking establishment. Thus, not only was a completely different kind of business involved, but also only a particular kind of ownership was prohibited. The statute did not attempt to secure monopoly power over a particular business for a limited group of individuals.

The Michigan case cited by the petitioner, **Superx Drugs Corp. v. Michigan Board of Pharmacy**, 146 N.W.2d 1 (Mich. 1966), has an appropriate factual situation, but hardly supports the petitioner's position. Of the seven judges on the Michigan Supreme Court, only one, (whose opinion oddly enough appears first in the printed decision) found it possible to uphold the Michigan State Board of Pharmacy's denial of a permit to a corporation failing to meet the Michigan ownership requirements. 146 N.W.2d at 1-5. Three judges failed to reach the constitutional questions because they felt the record established that the drug company came under a statutory exception. 146 N.W.2d at 5-10. The other four judges held, in two separate opinions, that the Michigan ownership restrictions violated the Due Process Clause. 146 N.W.2d at 10-19 and 19-23. The petitioner's conten-

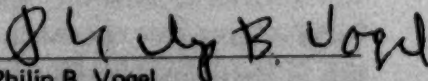
tion on page 9 of its petition that the Michigan judges did not feel bound by the *Liggett Co. v. Baldridge* case, is thus simply not borne out by the opinions.

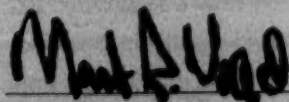
CONCLUSION

The decision in *Liggett Co. v. Baldridge* has not been undermined by recent pronouncements of the Supreme Court insofar as it applies to legislation restricting the ownership of pharmacies or insofar as it imposes on a state agency seeking to uphold restrictive legislation the obligation to produce at least some evidence tending to show a real and substantial relationship between the legislation and the public health, safety and welfare. Consequently, the North Dakota Supreme Court properly followed the decision and held, on the evidence before it, that the North Dakota legislation restricting the ownership of pharmacies to pharmacists failed to meet the constitutional requirements.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,


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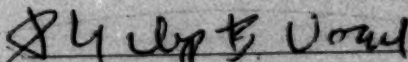


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March 20, 1973

**PROOF OF SERVICE – CERTIFICATE OF SERVICE –
SERVICE BY MAIL**

I, Philip B. Vogel, attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 20, 1973, I served a copy of the foregoing and attached Brief for Respondent in Opposition on the North Dakota State Board of Pharmacy, petitioner herein, by mailing three copies in a duly addressed envelope, with first class postage prepaid to Frederick E. Saefke, Jr., Counsel for Petitioner, 411 North Fourth Street, Post Office Box 1874, Bismarck, North Dakota 58501, and by mailing three additional copies with first class postage prepaid to Mr. A. William Lucas of Conmy, Conmy, Rosenberg & Lucas, Counsel of Record, 411 North Fourth Street, Post Office Box 1398, Bismarck, North Dakota 58501.



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